

LEG/SUB

Central Intelligence Agency

Washington, D.C.

APR 1986  
OCA 86-1014

Mr. James M. Frey  
Assistant Director for Legislative  
Reference  
Office of Management and Budget  
Washington, D.C. 20503

Dear Mr. Frey:

Enclosed please find a copy of a letter from the Agency's Deputy Director for Operations to Representative Hamilton, Chairman, House Permanent Select Committee on Intelligence.

The letter responds to the Chairman's request for the views of the Agency on H.R. 3963, a bill to authorize the Department of Defense to create certain commercial entities in connection with intelligence activities.

We ask that you advise us as to whether or not submission of this letter would be consistent with the Administration's program.

Your cooperation is most appreciated.

Sincerely,

/s/ David D. Gries

David D. Gries  
Director, Office of Congressional Affairs

Enclosure

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STAT

**HR 3963**

Amends Title 10 U.S.C. to add new Chapter 19

**AUTHORITY TO ESTABLISH:**

- (a) SECDEF (para. 391(a)(1))
- (b) with concurrence of Attorney General and DCI (para. 391(a)(1)).

**CERTIFICATION:**

- (a) required, in writing (para. 391(a)(1))
- (b) by SECDEF (para. 391(a)(1))
- (c) that commercial entity is "essential" (para. 393(a)(1)).

**SCOPE:** to provide cover for foreign intelligence collection activities (para. 391(a)(1)), i.e., collection of foreign intelligence or counterintelligence information and related support activities (subsec. 399(2)), but excludes counterintelligence activities or covert action (see sectional analysis for sec. 399).

**DURATION:**

- (a) for a period not to exceed two years (para. 391(a)(1));
- (b) renewable for additional periods of not to exceed two years each (para. 391(a)(2));
- (c) no limit on number of renewals (see sectional analysis for para. 391 (a)(2)); and

**ADMINISTRATION PROPOSAL**

Amends Title 10 U.S.C. to add new Chapter 19

**AUTHORITY TO ESTABLISH:**

- (a) SECDEF or MILSECS (subsec. 393a.)
- (b) after consultation with DCI and D/FBI, as appropriate (subsec. 393a.).

**CERTIFICATION:**

- (a) required, in writing (subsec. 393a.)
- (b) by Secretary concerned (SECDEF or MILSECS) (subsec. 393a.)
- (c) that commercial cover is "necessary" (subsec. 393a.).

**SCOPE:** to support intelligence collection activities (subsec. 393a.), i.e., collection of foreign intelligence or counterintelligence information (subsec. 392a.).

**DURATION:** no limit on duration but commercial cover entities are subject to annual review and audit (subsec. 396b.)

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(d) renewal requires same concurrences and certification (para. 391(a)(2)).

**TERMINATION:**

- (a) by SECDEF
- (b) at any time
- (c) without any concurrence or certification (subsec. 391(b)).

**DELEGATION:**

- (a) limits SECDEF delegation of subsec. 391(a), 394(2), 396(a), and 397(b) authority, functions, and duties to DEPSECDEF (sec. 398);
- (b) other authorities, functions, and duties may be delegated in accordance with 10 U.S.C. 133(d).

**ADMINISTRATION PROPOSAL**

**TERMINATION:** Not specifically addressed.

**DELEGATION:** Not specifically addressed; current applicable law/regulations would govern.

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**COMMERCIAL CREDIBILITY:**

(a) Administrative Support: authorizes SECDEF to acquire, use, and dispose of items and to provide special administrative support needed in the establishment, operation and termination of commercial entities. (sec. 392).

(b) Prevailing Commercial Practices: as necessary to protect intelligence sources, methods, or activities from unauthorized disclosure, the bill requires the establishment, operation, and termination of commercial entities to be in accordance with "prevailing commercial practices". (subsec. 394(1)).

(c) Waiver of Federal Statutes:

(i) grants extraordinary authority to waive the applicability of requirements in a broad spectrum of federal statutes to the extent necessary to protect intelligence sources, methods, and activities from unauthorized disclosure (subsec. 394(2));

(ii) categories of waivable statutes same as Administration draft, plus the following categories: federal services management; federal information management; and, federal tort claims (subsec. 394(2));

(iii) SECDEF waiver authority does not extend to: Title 10 U.S.C., new chapter 19 provisions; 50 U.S.C. 413, "Congressional oversight of intelligence activities," and the War Powers Resolution (subsec. 394(2)).

**ADMINISTRATION PROPOSAL**

**COMMERCIAL CREDIBILITY:**

(a) Administrative Support: authorizes SECDEF or MILSECS or their designees to acquire items necessary to establish or maintain a commercial cover (subsec. 394a.).

(b) Prevailing Commercial Practices: requires the establishment and operation of commercial entities to be in accordance with "prevailing commercial practices" so long as such practices are not inconsistent with the purposes of the commercial cover (subsec. 393b., 394b.).

(c) Waiver of Federal Statutes:

(i) waives certain categories of federal statutes with regard to the establishment and operation of commercial entities where the application of such laws would risk the compromise of commercial cover (subsec. 393b., 394b.);

(ii) categories of federal statutes subject to waiver are: appropriations, acquisitions, property management, employment management, and government corporation.

(d) Certification: Requires written certification by the SECDEF or his designee that application of such laws would risk the compromise of the commercial cover (subsec. 393b.).

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(d) Certification: requires written certification by SECDEF that compliance with provisions of enumerated statutes would be inconsistent with the protection of intelligence sources, methods and activities from unauthorized disclosure (subsec. 394(2))

**HANDLING OF FUNDS:**

(i) Deposit/Withdrawal of Funds: SECDEF authorized to deposit/withdraw:

(a) funds appropriated to DoD used to establish, operate, or terminate a section 391 commercial entity (paragraph 393(a)(1)); and

(b) funds generated by a subsec. 391 commercial entity (paragraph 393(a)(2)).

NOTE: No limitation on SECDEF delegation of this authority (see subsec. 398).

(ii) Funds Generated by Commercial Entity:

(a) may be used to offset necessary and reasonable expenses of that particular entity (subsection 393(b)).

(iii) Final Deposition of Funds:

Upon termination and after all obligations met, proceeds must be deposited in U.S. Treasury miscellaneous receipts (subsection 393(d)).

**ADMINISTRATION PROPOSAL**

**HANDLING OF FUNDS:**

(i) Deposit/Withdrawal of Funds: SECDEF or MILSECS or their designees authorized to deposit/withdraw:

(a) funds appropriated to DoD used to conduct commercial cover (subsection 393c.); and

(b) funds generated by the business entity (subsec. 393c.).

(ii) Funds Generated by Commercial Entity:

(a) may be used to offset necessary and reasonable expenses incurred by the commercial cover (subsec. 393d.);

(b) when no longer necessary for the conduct of the commercial cover, must be deposited in U.S. Treasury as miscellaneous receipts as soon as practicable (subsec. 393d.).

(iii) Final Disposition of Funds:

Upon liquidation, dissolution, sale, or other final disposition of a commercial cover, funds remaining after obligations are met must be deposited in the U.S. Treasury as miscellaneous receipts (subsection 393e.).

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**LIMITATIONS ON USE:**

(i) Caveat: New Chapter 19, Title 10 U.S.C. is not to be construed as authorizing foreign intelligence collection activities not otherwise authorized by or pursuant to law (subsection 395(a)).

(ii) Within the U.S.: Commercial entity prohibited from engaging in intelligence activities within U.S. except for:

- (a) training;
- (b) administration; and
- (c) recruitment of non-U.S. persons to serve as foreign intelligence sources outside the U.S. (paragraphs 395(b)(1), (2), and (3)).

(iii) Types of Overt Activity:

Commercial entities prohibited from engaging in:

- (a) communication media activity;
- (b) religious activity;
- (c) traffic in arms; or
- (d) security related services (subsec. 395(c)).

(iv) Use of U.S. Persons:

Unwitting employment, assignment or detail of U.S. person to the commercial entity is prohibited (subsec. 395(d)).

**ADMINISTRATION PROPOSAL**

**LIMITATIONS ON USE:**

Intelligence support activities authorized by sections 393/394 may be conducted only in accordance with regulations promulgated by the SECDEF (subsection 393a).

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**OVERSIGHT:**

**(i) Executive Branch:**

(a) SECDEF regulations promulgated pursuant to subsec. 396(a) must include provisions to ensure centralized departmental oversight (subparagraph 396(a)(2)(A));

(b) DoD IG must conduct at least annually programmatic and operational review and evaluation and financial audit and report results to SECDEF (subsection 396(b)).

**(ii) Congressional Branch:**

(a) SECDEF regulations promulgated pursuant to subsection 396(a) must include provisions to ensure compliance with Title V of National Security Act of 1947 (50 U.S.C. 413 relating to congressional oversight of intelligence activities) and the War Powers Resolution (subparagraph 396(a)(2)(D));

(b) DoD IG to report results of subsection 396(b) annual review/audit to House and Senate Intelligence Committees (subsection 396(b)).

**REGULATIONS:** After "consultation with Attorney General and DCI, SECDEF must issue regulations necessary to implement the new chapter 19 (subsection 396(a)(1)), including regulations ensuring:

**ADMINISTRATION PROPOSAL**

**OVERSIGHT:**

**(i) Executive Branch:**

(a) SECDEF directed to establish a system of departmental oversight and accountability for the commercial covers authorized by the legislation (subsec. 395);

(b) SECDEF or MILSECS must ensure annual review and audit of commercial covers (subsection 396b).

**(ii) Congressional Branch:** SECDEF or MILSECS must ensure that House and Senate Intelligence Oversight Committees are kept fully and currently informed per 50 U.S.C. subsection 413. (subsection 396b.).

**REGULATIONS:** Activities of commercial covers to comply with SECDEF regulations (subsection 396a).

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(a) effective management, operational, security, legal and accounting controls (subparagraph 396(a)(2)(B)); and

(b) coordination of commercial entity activities with State, FBI and CIA (subparagraph 396(a)(2)(C)).

**EXEMPTION FROM STATE LAWS/STATE COURT JURISDICTION:**

(a) specifies that commercial entities are entities of U.S.G. not subject to State laws or State court jurisdiction (subsection 397(a) and paragraph 397(b)(1));

(b) authorizes commercial entities to appear to comply with State laws or submit to State court jurisdiction if SECDEF certifies in writing that doing so is necessary to protect intelligence sources, methods, and activities from unauthorized disclosure or is necessary in the interests of justice (paragraph 397(b)(2)).

**DEFINITIONS:**

Defines:

- (a) commercial entity;
- (b) foreign intelligence collection activities;
- (c) intelligence activities; and

**ADMINISTRATION PROPOSAL**

**EXEMPTION FROM STATE LAWS/STATE COURT JURISDICTION:**

Not specifically addressed.

**DEFINITIONS:**

Defines:

- (a) intelligence collection activities;
- (b) intelligence support activities;
- (c) foreign intelligence;



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(d) United States person  
(subsections 399(1)-(4)).

DATE AMENDMENTS TAKE EFFECT:

Ninety days after enactment.

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(d) counterintelligence; and  
(e) commercial cover (subsections 392a.e.).

DATE AMENDMENTS TAKE EFFECT:

Upon enactment.